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To: Commissioner for Patents for **Examiner Fadey S. Jabr** **Group Art Unit 3639**	Facsimile No.: **571/273-8300**
From: Candace Crawford Legal Assistant to Peter Manzo	No. of Pages Including Cover Sheet: **15**
Message: Enclosed herewith: • Transmittal of Reply Brief; and • Reply Brief.	
Re: Application No. **09/832,438** Attorney Docket No: **YOR920010031US1**	
Date: Wednesday, June 14, 2006	
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JUN 14 2006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: **Liu et al.**

Serial No.: **09/832,438**

Filed: **April 10, 2001**

For: **Apparatus and Methods for Maximizing Service-Level-Agreement Profits**

§ Group Art Unit: **3639**

§

§ Examiner: **Fadey S. Jabr**

§

§ Attorney Docket No.: **YOR920010031US1**

§

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I hereby certify this correspondence is being transmitted via facsimile to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, facsimile number (571) 273-8300 on June 14, 2006.

By: Candace Crawford
Candace Crawford

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PATENT TRADEMARK OFFICE
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TRANSMITTAL OF REPLY BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:
ENCLOSED HEREWITH:

- Reply Brief (37 C.F.R. 41.41).

No fees are believed to be required. If, however, any fees are required, I authorize the Commissioner to charge these fees which may be required to IBM Corporation Deposit Account No. 50-0510.

Respectfully submitted,

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PATENT

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By: Candace Crawford
Candace Crawford

REPLY BRIEF (37 C.F.R. 41.41)

This Reply Brief is submitted in response to the Examiner's Answer mailed on April 26, 2006.

No fees are believed to be required to file a Reply Brief. If any fees are required for filing this Reply Brief, those fees are dealt with in the accompanying TRANSMITTAL OF REPLY BRIEF.

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STATUS OF CLAIMS

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1, 3-15, 17-29, and 31-42.

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims canceled: 2, 16, and 30.
2. Claims withdrawn from consideration but not canceled: none.
3. Claims pending: 1, 3-15, 17-29, and 31-42.
4. Claims allowed: none.
5. Claims rejected: 1, 3-15, 17-29, and 31-42.
6. Claims objected to: none.

C. CLAIMS ON APPEAL

The claims on appeal are: 1, 3-15, 17-29, and 31-42.

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A. GROUND OF REJECTION 1 (Claims 1 and 3-14)

Claims 1 and 3-14 stand rejected under 35 U.S.C. § 101 as being directed towards non-statutory subject matter.

"The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the Examiner. Claims 15, 17-29 and 31-42 no longer stand rejected under 35 U.S.C. § 101 as being directed towards non-statutory subject matter." Examiner's Answer dated April 26, 2006, page 2, item 6. In addition the Examiner states, "Appellant's arguments regarding the interrelationship between the preamble and the body of the claim are convincing. Examiner withdraws the 35 U.S.C. § 101 rejection corresponding to the preamble and the body of the claim." Examiner's Answer dated April 26, 2006, page 10, lines 1-3.

B. GROUND OF REJECTION 2 (Claims 1, 3-15, 17-29, and 31-42)

Claims 1, 3-15, 17-29, and 31-42 stand rejected under 35 U.S.C. § 103 as being unpatentable over Smith, U.S. Patent Publication No. 2002/0091854A1 in view of Denise Pappalardo, *ISPs continue to improve Internet access SLAs*, 18 Network World 25, 25-27 (Feb. 19, 2001).

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ARGUMENT

A. GROUND OF REJECTION 1 (Claims 1 and 3-14)

The Examiner rejects claims 1 and 3-14 under 35 U.S.C. § 101 as being directed towards non-statutory subject matter. This rejection is respectfully traversed.

The fact that a claim is drawn towards a subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula, computer program, or digital computer. *Diamond v. Diehr*, 450 U.S. 175, 209 U.S.P.Q. 1 (1981). The claim must be considered as a whole when making an analysis regarding statutory subject matter. *Parker v. Flook*, 437 U.S. 584, ___, 198 U.S.P.Q. 193, ___ (1978); *Diamond v. Diehr*, 450 U.S. 175, ___, 209 U.S.P.Q. 1, ___ (1981). "As summarized by the PTO in *Ex Parte Logan*, 20 U.S.P.Q.2d 1465, 1468 (PTO Bd. Pat. App. and Inter. 1991), the emphasis is 'on *what* the claimed method steps do rather than *how* the steps are performed." *Arrhythmia Research Technology, Inc. v. Corazonix Corp.*, 22 U.S.P.Q.2d 1033 (Fed. Cir. 1993). In this case, claims 1 and 3-14 are directed to statutory subject matter when considered as a whole and what the claimed method steps do.

In rejecting claims 1 and 3-14, the Examiner states:

> As per **Claims 1 and 3-14**, these claims recite a series of steps and are considered for the purpose of analysis under 35 U.S.C. 101 as reciting a series of steps. The claims do not recite an pre- or post-computer activity but merely perform a series of steps of calculating a total profit and allocating resources, and is directed to non-statutory subject matter. A process is statutory if it requires physical acts to be performed outside of the computer independent of and following the steps performed by a programmed computer, where those acts involve the manipulation of tangible physical objects and result in the object having a different physical attribute or structure (*Diamond v. Diehr*, 450 U.S. at 187, 209 USPQ at 8). Further, the claims merely manipulate an abstract idea (calculating profit and allocating resources) or perform a purely mathematical algorithm without limitation to any practical application. A process which merely manipulates an abstract idea or performs a purely mathematical algorithm is non-statutory despite the fact that it might have some inherent usefuleness (*Sakar*, 558 F.2d at 1335, 200 USPQ at 139).
>
> Furthermore, in determining whether the claimed subject matter is statutory under 35 U.S.C. 101, a practical application test should be conducted to determine whether a "useful, concrete and tangible result" is accomplished. See *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352, 1359-60, 50 USPQ2d 1447, 1452-53 (Fed. Cir. 1999); *State Street Bank & Trust Co. v. Signature*

Financial Group, Inc., 149 F.3d 1368, 1373, 47 USPQ2d 1596, 1600 (Fed. Cir. 1998).

An invention, which is eligible or patenting under 35 U.S.C. 101, is in the "useful arts" when it is a machine, manufacture, process or composition of matter, which produces a concrete, tangible, and useful result. The fundamental test for patent eligibility is thus to determine whether the claimed invention produces a "use, concrete and tangible result". The test for practical application as applied by the examiner involves the determination of the following factors"

(a) "Useful" - The Supreme Court in *Diamond* v. *Diehr* requires that the examiner look at the claimed invention as a whole and compare any asserted utility with the claimed invention to determine whether the asserted utility is accomplished. Applying utility case law the examiner will note that:

i. the utility need not be expressly recited in the claims, rather it may be inferred.

ii. if the utility is not asserted in the written description, then it must be well established.

(b) "Tangible" - Applying *In re Warmerdam*, 33 F.3d 1354, 3 1 USPQ2d 1754 (Fed. Cir. 1994), the examiner will determine whether there is simply a mathematical construct claimed, such as a disembodied data structure and method of making it. If so, the claim involves no more than a manipulation of an abstract idea and therefore, is nonstatutory under 35 U.S.C. 101. In *Warmerdam* the abstract idea of a data structure became capable of producing a useful result when it was fixed in a tangible medium, which enabled its functionality to be realized.

(c) "Concrete" - Another consideration is whether the invention produces a "concrete" result. Usually, this question arises when a result cannot be assured. An appropriate rejection under 35 U.S.C. 101 should be accompanied by a lack of enablement rejection, because the invention cannot operate as intended without undue experimentation.

The claims, as currently recited, appear to be directed to nothing more than a series of steps including allocating resources, calculating and subtracting data which is nothing more than manipulating numbers without any useful, concrete and tangible result and are therefore deemed to be non-statutory. While these numbers may be concrete and/or tangible, there does not appear to be any useful result.

Regarding the 35 U.S.C. § 101 rejection outlined in the above, Appellant asserts that the data processing system allocated resources of the computing system for each request received by determining whether a profit or penalty is generated for each request according to the service level agreement has practical application. Examiner notes that allocation of resources of the computing system based on a service level agreement is non-statutory. Taking the broadest interpretation, allocation is the mere act of allotting or assigning, as defined in Webster's dictionary. In order for allocating to be statutory the result would

> require the physical distribution of resources and not the simple act of assigning which resources are to be operated, which may be carried out mentally without any useful, concrete or tangible result. The Appellant's specification lacks a definition that would otherwise state allocating to be anything other than the mental assigning of which resource to be operated.

Examiner's Answer dated April 26, 2006, pages 3-5 and 9, respectively.

The Examiner alleges above that claims 1 and 3-14 are non-statutory because they "do not recite an pre- or post-computer activity but merely perform a series of steps of calculating a total profit and allocating resources." Examiner's Answer dated April 26, 2006, pages 3, lines 8-10. However, "to properly determine whether a claimed invention complies with the statutory invention requirements of 35 U.S.C. § 101, USPTO personnel must first identify whether the claim falls within at least one of the four enumerated categories of patentable subject matter recited in section 101 (process, machine, manufacture or composition of matter)." *Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility*, pages 14 and 15. "The term 'process' means process, art, or method...." *Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility*, page 13.

Independent claim 1 of the present invention reads as follows:

> 1. A method in a data processing system of allocating resources of a computing system to hosting of a data network site to thereby maximize generated profit, comprising:
>
> calculating a total profit for processing requests received by the computing system for the data network site based on at least one service level agreement; and
>
> allocating resources of the computing system to maximize the total profit, wherein calculating a total profit includes, for each request received by the computing system for the data network site, determining whether processing of the request generates a revenue or a penalty, wherein a revenue is generated when the allocation of resources is such that the request is processed in accordance with the service level agreement and a penalty is generated when the allocation of resources is such that the request is not processed in accordance with the service level agreement, and wherein the total profit is obtained by subtracting the penalty from the revenue for each request.

Claim 1 recites "[a] method in a data processing system of allocating resources of a computing system...." Consequently, method claim 1 and dependent method claims 3-14, which depend upon independent claim 1, fall within the process category of patentable subject matter

according to the Interim Guidelines. Hence, claims 1 and 3-14 contain patentable subject matter.

Also, "[i]n determining whether the claim is for a 'practical application,' the focus is not on whether the steps taken to achieve a particular result are useful, tangible and concrete, but rather that the final result achieved by the claimed invention is "useful, tangible and concrete." *Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility*, page 20. The recited method of claim 1 achieves a useful, tangible, and concrete final result in a data processing system by allocating resources of a computing system to hosting of a data network site to thereby maximize generated profit by calculating a total profit for *processing* requests received by the computing system for the data network site based on at least one service level agreement and allocating resources of the computing system to maximize the total profit, wherein calculating a total profit includes, for each request received by the computing system for the data network site, determining whether *processing* of the request generates a revenue or a penalty, wherein a revenue is generated when the allocation of resources is such that the request is processed in accordance with the service level agreement and a penalty is generated when the allocation of resources is such that the request is not processed in accordance with the service level agreement, and wherein the total profit is obtained by subtracting the penalty from the revenue for each request. The preamble of claim 1 recites a method in a data processing system for allocating computing system resources to maximize profit. The steps recite in claim 1 calculating a total profit for processing requests received by the computing system and allocating resources of the computing system by determining whether processing of each request generates a revenue or penalty. A revenue is generated when the allocation of resources is such that the request is processed in accordance with the service level agreement and a penalty is generated when the allocation of resources is such that the request is not processed in accordance with the service level agreement. In other words, the data processing system allocates resources of the computing system to process received requests in such a way as to maximize profits.

The Examiner alleges that "[t]he claims...appear to be directed to nothing more than a series of steps including allocating resources, calculating and subtracting data which is nothing more than manipulating numbers without any useful, concrete and tangible result and are therefore deemed to be non-statutory. While these numbers may be concrete and/or tangible, there does not appear to be any useful result." Examiner's Answer dated April 26, 2006, page 5,

lines 5-9. Appellants agree with the Examiner that "these numbers may be concrete and/or tangible", but respectfully disagree that "there does not appear to be any useful result."

Processing requests as recited in claim 1 requires that the data processing system allocate resources of the computing system to maximize profits. In order to process each received request the allocated resources or components of the computing system perform the request in accordance with a service level agreement. Even though the present invention performs the "act of allotting or assigning" resources of the computing system as the Examiner alleges (Examiner's Answer dated April 26, 2006, page 9, lines 11-14), the act of allocating computing system resources by the data processing system is for the purpose of processing each received request in a way that maximizes profits by determining whether processing of the request generates a revenue or a penalty in accordance with a service level agreement as recited in claim 1. Therefore, the useful final result of the present invention is the processing of received requests by allocated computing system resources to maximize profits.

Furthermore, a "physical" component or resource of the computing system must be utilized in order to process the received request. As a result, the method recited in claim 1 cannot "be carried out mentally without any useful, concrete or tangible result" as the Examiner alleges. Examiner's Answer dated April 26, 2006, page 9, lines 16. Thus, the present invention recited in claim 1 does more than "merely manipulate an abstract idea (calculating profit and allocating resources) or perform a purely mathematical algorithm without limitation to any practical application." Examiner's Answer dated April 26, 2006, page 3, lines 14-16.

In view of the foregoing, claim 1 contains patentable subject matter and has practical application. Claims 3-14 are dependent claims depending on independent claim 1. As a result, claims 3-14 also contain patentable subject matter and have practical application, at least by virtue of their dependence on claim 1. Therefore, claims 1 and 3-14 recite statutory subject matter under § 101. Accordingly, Appellants respectfully urge the Board of Patent Appeals and Interferences not to sustain the rejection of claims 1 and 3-14 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

B. GROUND OF REJECTION 2 (Claims 1, 3-15, 17-29, and 31-42)

The Examiner rejects claims 1, 3-15, 17-29, and 31-42 under 35 U.S.C. § 103 as being

unpatentable over Smith, U.S. Patent Publication No. 2002/0091854A1 ("Smith") in view of Denise Pappalardo, *ISPs continue to improve Internet access SLAs*, 18 Network World 25, 25-27 (Feb. 19, 2001) ("Pappalardo"). This rejection is respectfully traversed.

"Examiner does not rely on Smith to teach allocation of computing system resources are based on whether each request received by the computing system generates a revenue or penalty in accordance with the service level agreement. Also, Examiner does not rely on Smith to teach determining whether processing of the request generates a revenue or a penalty, wherein a revenue is generated when an allocation of resources is such that the request is processed in accordance with the service level agreement." Examiner's Answer dated April 26, 2006, page 11, line 18 – page 12, line 1. [Emphasis added]. Appellants agree with the Examiner that Smith does not teach or suggest these recited claim 1 features. Independent claim 1 of the present invention, shown in Section A above, is representative of independent claims 15 and 29 with regard to similarly recited subject matter.

Also with regard to the Smith reference, the "Examiner notes that Smith discloses allocating servers and resources on an as-needed basis to the web sites and applications of the business in response to the immediate demand for Internet access to those web sites and applications. Examiner further notes that 'as-needed' is interpreted to mean many reasons. For example, the fundamental principle of business is to maximize profit. The greater demand for Internet access in Smith would generate additional profit for the service provider and therefore allocating resources to meet the greater demand would maximize profit." Examiner's Answer dated April 26, 2006, page 10, line 19 – page 11, line 4. Appellants agree with the Examiner that the fundamental principle of a business is to maximize profits. However, Smith only teaches one method for allocation of resources and that method is based upon demand to Internet Web sites on an 'as needed basis." In addition, Smith only teaches one method for an internet service provider to maximize its profits and that method is to use a 3-tier commission percentage based on usage of service. Smith makes no reference to "allocating resources of the computing system to maximize the total profit, wherein calculating a total profit includes, for each request received by the computing system for the data network site, determining whether processing of the request generates a revenue or a penalty" as recited in independent claim 1 of the present invention.

The Examiner continues on to state that "...Smith discloses that the business is not locked into a given capacity, according to their service level agreement, therefore it is not necessary for the business to waste scarce financial resources by scaling its service capacity in order to handle a small number of peak access times. When the service provider allocates resources to meet the greater demand by the business, the service provider increases profit by charging for the additional resources (Para. 13- 16)." Examiner's Answer dated April 26, 2006, page 11, lines 4-9. Again, Smith only teaches that the internet service provider increases profit by using the 3-tier commission percentage based on usage of service. In other words, profits for the internet service provider using the method as taught by Smith are increased as usage of the service increases over the average base tier into the second and third tiers and that the internet service provider's system resources are only allocated on an as needed basis to accommodate the increased usage demand on the network. However, Smith does not teach or suggest that the data processing system allocates resources of the computing system by determining whether processing of each request generates a revenue or a penalty as recited in claim 1. Thus, Smith does not teach or suggest these recited claim 1 features.

The Examiner relies on Pappalardo to teach "generating revenue by charging the business a fee for processing the request according to the service level agreement and generating a penalty when the request is not processed according the service level agreement" as stated in the Final Office Action dated October 27, 2005. Examiner's Answer dated April 26, 2006, page 12, lines 1-6. In addition, the "Examiner notes that when the service provider fails to process the business service request according to the service level agreement a penalty is generated. The penalty in Pappalardo is a credit that is given to the business, which is based on the monthly access service fee; therefore the revenue is determined by subtracting the credit from the service fee." Examiner's Answer dated April 26, 2006, page 12, lines 11-14. Even though Pappalardo may teach that a credit is given to a customer on a monthly billing statement by an internet service provider for not providing service in accordance with a service level agreement, Pappalardo does not teach or suggest allocating resources of the computing system to maximize the total profit by determining whether processing of each request generates a revenue or penalty for the computing system for the data network site as recited in claim 1.

First, Pappalardo makes no reference to the allocation of computing system resources for any reason. Therefore, Pappalardo does not teach or suggest this recited claim 1 feature. Second, because Pappalardo does not teach or suggest allocating resources of the computing system, Pappalardo cannot teach or suggest allocating resources of the computing system to maximize the total profit as further recited in claim 1. Third, since Pappalardo cannot teach or suggest allocating resources of the computing system to maximize the total profit, then Pappalardo cannot teach or suggest determining whether processing of each request generates a revenue or penalty in order to properly allocate resources of the computing system to maximize total profit, wherein the total profit is obtained by subtracting the penalty from the revenue for each request as further recited in claim 1.

Instead, Pappalardo teaches that a customer will receive a one-day service credit of $66 if more than .07% of their packets are lost in one month. Pappalardo, lines 28-29. Consequently, .07% of the packets sent over the network are required to be lost over a period of one month before a customer receives a credit from the internet service provider as taught by Pappalardo. However, if only .069% of the packets are lost in a month by the internet service provider using the method as taught by Pappalardo, no credit is given to the customer. Thus, no penalty is accessed to the internet service provider for losing packets for individual service requests if the threshold is not exceeded. In other words, for each request received by the internet service provider using the method as taught by Pappalardo, a determination is not made as to whether processing of each request generates a revenue or penalty in order to properly allocate resources of the computing system to maximize the total profit.

When a credit is given to the customer by the service provider for failing to meet the service level agreement in Pappalardo, the credit is a full one-day credit of $66 and is not based upon each request. Further, the period of time for calculating whether the customer receives a credit is at the end of each month and is not calculated for each request. Also, the number of packets required to be lost during a month is fixed at .07% and is not based upon each request.

The "Examiner notes that Pappalardo teaches summing the packet loss for a dedicated T-1 line, and based on the amount of packet loss summing the amount of the credit. Therefore, seeing as the profit is the access service fee less the credit, the sum of the profit is determined by the amount of the penalty (Lines 28-32)." Examiner's Answer dated April 26, 2006, page 13,

lines 12-16. Pappalardo does not teach or suggest summing the amount of the credit as the Examiner alleges because the credit is a fixed credit of $66 if the packet loss exceeds a fixed threshold of .07% in a one month period. Pappalardo makes no reference to making a revenue/penalty calculation for each received request as recited in claim 1. Pappalardo merely teaches adding the number of packets lost at the end of a monthly billing cycle to determine if the total number of packets lost exceeds the threshold and only if the number of packets lost over the month exceeds the threshold will the customer receive a fixed amount of credit. Furthermore, it doesn't matter how many packets are lost in excess of the threshold by the internet service provider because the customer will still only receive a fixed credit of $66. In other words, the internet service provider may lose 25% or more of the data packets in a month and still only pay $66 in credit to the customer. Therefore, Pappalardo does not teach or suggest "for each request received by the computing system for the data network site, determining whether processing of the request generates a revenue or a penalty, wherein a revenue is generated when the allocation of resources is such that the request is processed in accordance with the service level agreement and a penalty is generated when the allocation of resources is such that the request is not processed in accordance with the service level agreement, and wherein the total profit is obtained by subtracting the penalty from the revenue for each request" as recited in claim 1.

In response to the Examiner's argument that, "...one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 41 3,208 USPQ 871 (CCPA 198 1); *In re Merck & Co.*, 800 F.2d 109 1, 23 1 USPQ 375 (Fed. Cir. 1986)." Examiner's Answer dated April 26, 2006, page 12, lines 6-9. Since neither Smith nor Pappalardo teach or suggest allocating resources of the computing system to maximize the total profit, wherein calculating a total profit includes, for each request received by the computing system for the data network site, determining whether processing of the request generates a revenue or a penalty, wherein a revenue is generated when the allocation of resources is such that the request is processed in accordance with the service level agreement and a penalty is generated when the allocation of resources is such that the request is not processed in accordance with the service level agreement, and wherein the total profit is obtained by subtracting the penalty from the revenue for each request as recited in claim 1, then the

combination of Smith and Pappalardo cannot teach or suggest the above-recited features. Therefore, one can show nonobviousness by attacking references individually where the rejection is based on combinations of references by showing that neither reference teaches nor suggests particular features recited in the claims.

In addition to the comments above, Appellants rely on the Appeal Brief to rebut the Examiner's Answer. Accordingly, in view of the foregoing, Appellants respectfully urge the Board of Patent Appeals and Interferences not to sustain the rejection of independent claims 1, 15, and 29 as being unpatentable over Smith in view of Pappalardo. Claims 3-14, 17-28, and 31-42 are dependent claims depending on independent claims 1, 15, and 29, respectively. As a result, Appellants respectfully urge the Board of Patent Appeals and Interferences not to sustain the rejection of dependent claims 3-14, 17-28, and 31-42, at least by virtue of their dependence on independent claims 1, 15, and 29.

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